

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.-----

L. J. SCOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

THE OPINION OF THE COURT

The opinion in the Circuit Court of Appeals for the Tenth Circuit was rendered October 16, 1944, but has not yet been published. (R. 32.)

II

JURISDICTION

1. Jurisdiction to entertain this petition is vested in this Court under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A.

section 347 (a)); also Act of March 8, 1934 (18 U. S. C. A. 688) and Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt in Criminal Cases brought in the District Courts of the United States, promulgated May 7, 1934 (18 U. S. C. A. following section 688).

2. The opinion of the Circuit Court of Appeals was rendered October 16, 1944 (R. 32), time to file petition for rehearing extended to November 6, 1944 (R. 37) and Petition for Rehearing denied November 14, 1944 (R. 51).

3. Petitioner, Robert Cabe and Sarah Ives were indicted by a Grand Jury in the United States District Court, Eastern District of Oklahoma, charged with violation of United States Statutes (R. 14); petitioner was tried and convicted by a Jury (R. 5) and ordered committed to the custody of the Attorney General (R. 78) which Conviction, Judgment and Commitment was affirmed by the Circuit Court of Appeals, Tenth Circuit (R. 32-37).

4. The following cases sustain the jurisdiction of this Court: *Warner vs. New Orleans*, 167 U. S. 467, 17 S. Ct. 892, 42 L. Ed. 239; *U. S. vs. Gulf Refining Co.*, 45 S. Ct. 597, 268 U. S. 542, 69 L. Ed. 1082; *Law Ow Bew vs. U. S.*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

III

STATEMENT OF THE CASE

The indictment contained five counts as follows:

Count 1 charged the possession or custody or control of a still and distilling apparatus for the production of spirituous liquors, set up, without having same registered as required by law and in violation of Title 26 U. S. C. A. section 2810;

Count 2: Carrying on the business of a distiller of spirituous liquors without having given bond in violation of Title 26, U. S. C. A. section 2833;

Count 3: Working at a distillery for the production of spirituous liquors, upon which no sign bearing the words, "Registered Distillery" was placed and kept in violation of Title 26 U. S. C. A. section 2831;

Count 4: Making and fermenting mash, wort or wash fit for distillation and for the production of spirits or alcohol, in a building or on premises other than a duly authorized distillery, in violation of Title 26 section 2834;

Count 5: Possession of non-taxpaid whiskey in violation of Title 26 U. S. C. A. section 2803.

Petitioner was convicted on counts 1 (possession or custody or control of still), 2 (carrying on business of distillery without making bond), and 5 (possession of non-taxpaid whiskey). He was acquitted on counts 3 (working at a distillery) and 4 (making or fermenting mash, etc.)

Sarah Ives was acquitted by a jury on all five counts. Robert Cabe entered a plea of guilty to all five counts (R. 5).

At the conclusion of the Government's evidence petitioner demurred thereto on the ground that the same was insufficient to prove the allegations of the indictment or to show the commission of the crime charged (R. 19). At the conclusion of all of the evidence the petitioner moved for an instructed verdict of not guilty (R. 27).

Motion for New Trial was filed and overruled (R. 8).

Petitioner was ordered committed to the custody of the Attorney General for a period of two years on each count 1, 2 and 5, all to run concurrently with each other, and fined \$100.00 on each count 1 and 2, all on execution (R. 8).

Upon appeal to the Circuit Court of Appeals judgment was affirmed (R. 32).

IV

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in not following the rules announced by this Court in *Clyatt vs. U. S.*, 197 U. S. 207, 49 L. Ed. 726; *Abrams vs. U. S.*, 250 U. S. 616, 63 L. Ed. 1173, and cases cited therein.

2. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals in *Spalitto vs. U. S.*, 8 Cir. 39 Fed. (2d) 782; *Philyaue vs. U.*

S., 8 Cir. 29 Fed. (2d) 225; *Kassin vs. U. S.*, 5 Cir. 87 Fed. (2d) 18; *U. S. vs. Russo*, 3 Cir. 123 Fed. (2d) 420; *Colbaugh vs. U. S.*, 8 Cir. 15 Fed. (2d) 929; *Eng Jung vs. U. S.*, 3 Cir. 46 Fed. (2d) 66, and other Circuit Court cases cited herein.

3. Decisions of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

V

ARGUMENT

PROPOSITION NO. 1

The Circuit Court of Appeals erred in not following the rules announced by this Court in *Clyatt vs. U. S.*, 197 U. S. 207, 49 L. Ed. 726; *Abrams vs. U. S.*, 250 U. S. 616, 63 L. Ed. 1173, and cases cited therein.

1. The Government's case was based upon circumstantial evidence and substantially established that in March, 1943, petitioner rented the place where the still and whiskey were found on October 8, 1943 (R. 14). At that time the place was in possession of the defendants Sarah Ives and Robert Cabe (R. 18). The petitioner did not live there and was not in possession of the place. Scott was engaged in the hauling and trucking business and was at the place only three or four times from the first of August until the still

was discovered on October 8th (R. 18). A car belonging to petitioner was found at the place at the time of the raid. In the car were four ten-pound sacks of sugar, some trousers and shoes. The clothes and shoes were afterwards identified as belonging to petitioner (R. 15-16).

Petitioner earnestly contends that the only substantial evidence from which his guilt might have been inferred was evidence that he rented the place in March upon which the still and whiskey were found in October and that his car was found at the place at the time of the raid. The whiskey was shown to have been made out of syrup and not sugar (R. 14) and considerable syrup was found on the place. This evidence on the part of the Government tended to establish that the sugar in petitioner's car was not to be used in the making of whiskey, or at least there on the place, because this whiskey, as stated, was made of syrup. The petitioner contends that the evidence was wholly insufficient to warrant a verdict of guilty and that the Circuit Court of Appeals did not follow cases from this Court having application to like procedure in affirming.

In *Clyatt vs. U. S.* *supra*, this Court said:

"No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

In the Abrams case the following rule is announced in the second headnote:

“The contention that there is no substantial evidence in the record to support a judgment on a verdict of guilty, and that the motion of defendants for an instructed verdict in their favor was erroneously denied, presents a question of law which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence competent and substantial before the jury, fairly tending to sustain the verdict.”

It is the petitioner's contention that the Circuit Court of Appeals did not view this case in the light of these holdings and that the record was not examined for the purpose of determining whether or not at the close of the Government's case and again at the close of the whole case there was competent and substantial evidence, fairly tending to sustain the verdict. Circuit Judge Phillips did this in his dissenting opinion, but the majority of the Court did not do so. It is true that in the concluding sentence of the majority opinion it is stated that the evidence is found to be legally sufficient but the standard set by the majority in its opinion upon which this holding is based is not in accord with the decisions of this Court. The petitioner earnestly contends that if the Circuit Court had applied the principles of the *Clyatt* and *Abrams* cases to the case at bar it would have reached a different conclusion and would have been compelled to hold that the evidence was not sufficient to justify the conviction.

Petitioner believes that the following quotation from *McNabb vs. United States*, 318 U. S. 332, 87 L. Ed. 819, 824, is apropos here:

"The scope of our reviewing power over convictions brought here from Federal Courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force."

PROPOSITION NO. 2

The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals in *Spalitto vs. U. S.*, 8 Cir., 39 Fed. (2d) 782; *Philyaw vs. U. S.*, 8 Cir., 29 Fed. (2d) 225; *Kassin vs. U. S.*, 5 Cir., 87 Fed. (2d) 18; *U. S. vs. Russo*, 3 Cir., 123 Fed. (2d) 420; *Colbaugh vs. U. S.*, 8 Cir., 15 Fed. (2d) 929; *Eng Jung vs. U. S.*, 3 Cir., 46 Fed. (2d) 66, and other Circuit Court cases cited herein.

1. In its Opinion the Circuit Court of Appeals said:

"There is no direct evidence to connect the appellant with the still, its operation, or the possession of the non-taxpaid liquor found in the house. No one testified of having seen him at the still, or that he was in any way connected with it. The verdict of the jury rests upon inferences drawn from the admitted facts that he had leased the premises from the owner; that his fiance, whom he later married, was living in the house when the still was found; that his car was there with his clothes and four 10-

pound sacks of cane sugar, which was susceptible to use in the manufacture of alcoholic spirits, and that he was 'in and out' of the place while the still was in operation. The jury was asked to believe that although he rented the place, and his fiance lived in it with her two small children, she lived there with Cabe while Cabe was operating the still without appellant's knowledge within 225 yards of the house, and that 108 gallons of non-taxpaid whiskey was stored in the loft of the house without his or her knowledge."

To hold that petitioner could be convicted if either he or his co-defendant Sarah Ives knew of the still or whiskey is in conflict with *Colbaugh vs. U. S.*, 8 Cir., 15 Fed. (2d) 929; *Eng Jung vs. U. S.*, 3 Cir., 46 Fed. (2d) 66; *Murphy vs. U. S.*, 8 Cir., 18 Fed. (2d) 509. Petitioner also contends that to hold that he could be convicted if his co-defendant Sarah Ives knew about the still and whiskey even though she afterwards became his wife is in violation of the rights guaranteed to him under the Fifth Amendment to the Constitution and in contravention of the established principles of justice in Federal Courts.

2. In *Cox vs. United States*, 8 Cir. 96 Fed. (2d) 41; *Riboste et al vs. United States*, 8 Cir., 44 Fed. (2d) 21; *Stutz vs. United States*, 5 Cir., 47 Fed. (2d) 1029; *Paddock vs. United States*, 9 Cir., 79 Fed. (2d) 872; *McLaughlin vs. United States*, 3 Cir., 26 Fed. (2d) 1; *Turnetti vs. United States*, 8. Cir., 2 Fed. (2d) 15; *United States vs. Morley*, 7 Cir., 99 Fed. (2d) 683; *Spalitto vs. United States*, 8 Cir., 39 Fed. (2d) 782; *Kassin vs. United States*, 5 Cir., 87

Fed. (2d) 183, the following rules applicable to criminal cases are stated: In a criminal prosecution, if defendant's acts and his professions of innocence are reconcilable, defendant should be dismissed; proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction; circumstantial evidence must be consistent with guilt and inconsistent with innocence and so strong as to remove every other reasonable hypothesis except defendant's guilt; when a circumstance relied on as evidence of guilt is susceptible of inference favorable to innocence, it is robbed of all probative value, though from other evidence guilt may be fairly deducible.

Petitioner earnestly contends the Circuit Court of Appeals failed to apply these principles of law to this case. Witness the statement in the opinion "that his car was there with his clothes and four 10-pound sacks of cane sugar, which was susceptible to use in the manufacture of alcoholic spirits, and that he was 'in and out' of the place while the still was in operation." The statement that the sugar "was susceptible to use in the manufacture of alcoholic spirits" overlooks the government's evidence that the whiskey was made of syrup, a substantial quantity of which was found by the officers. In view of this fact the evidence about the sugar proved nothing and should not have been used against petitioner. The evidence is that petitioner was "in and out" of the place three or four times from August 1 to

October 8. As we point out under another proposition there was no evidence that he was there at any time while the still was in operation. His being "in and out" three or four times in 68 days is no evidence of guilt in this case, especially when viewed in the light of his subsequent marriage to Sarah Ives, who was living on the place, and who, with Cabe were in possession and custody. These circumstances were as consistent with innocence as with guilt.

Petitioner respectfully submits that the opinion in this case is in conflict with the above cases; that if the principles of law enunciated in these cases had been applied to his case a different result would have been reached. Witness the dissenting opinion of Circuit Judge Phillips. The failure of the Circuit Court of Appeals to follow these cases results in a conflict between the decision in this case and the cited cases requiring the intervention of this Court in petitioner's behalf.

PROPOSITION NO. 3

The decision of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in Criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

1. The Circuit Court of Appeals in its opinion (R. 35) asserts the admitted facts to be, among others, that:

"Petitioner was 'in and out' of the place while the still was in operation."

It is earnestly submitted that there is no evidence in the record to justify this finding. There is no evidence that the petitioner ever knew about the whiskey or the still. There is no evidence as to when it was in operation. There is no evidence that petitioner was at the place at any time while the still was in operation.

Petitioner believes he is justified in the position that the Circuit Court in reaching the conclusion that the evidence was legally sufficient to sustain the conviction considered as against him and in favor of the Government (1) that the evidence was sufficient from which the jury could infer that petitioner knew about the whiskey and still and that if he did have knowledge of it he could be convicted on counts 1, 2 and 5; (2) that the evidence was sufficient from which the jury could infer that Sarah Ives knew about the whiskey and still and that if she did have knowledge of it this petitioner could be convicted on counts 1, 2 and 5; (3) that the jury could infer the sugar in petitioner's car was to be used in making whiskey in the still found by the arresting officers and that such fact was a circumstance showing petitioner's connection with the whiskey and still and (4) that petitioner being "in and out several times while the still was in operation" must have had some connection therewith. In each instance the Circuit Court of Appeals failed to view this case in accordance with recognized standards and usual course of procedure in criminal cases in Federal Courts and wherein it is held petitioner could have been

convicted if Sarah Ives knew of the whiskey and still petitioner is denied his constitutional rights as guaranteed by the Fifth Amendment to the Constitution; also wherein the Circuit Court of Appeals found as an admitted fact that petitioner had been "in and out several times while the still was in operation" when, as petitioner earnestly contends, there is no evidence justifying this finding; no evidence that he was there at any time when the still was in operation. As a matter of fact, no evidence as to when the still was in operation. The case of *Emma S. Fayerweather and Mary W. Achter vs. Thomas G. Ritch et al*, 195 U. S. 275, 49 L. Ed. 193, is applicable. The first headnote follows:

"The application of the due process of law clause of U. S. Const. 5th Amend. is involved so as to sustain a direct appeal to the Federal Supreme Court from a circuit court, where the latter court gave effect, as *res judicata*, to the judgment of a state court which is claimed unlawfully to have deprived the parties of their property under the forms of law, without any judicial finding of the vital fact which alone could justify such deprivation."

It is apparent that evidence showing petitioner to have been on the place when the still was in operation would have had considerable weight. But there is no such evidence in the record and the use of it by the Circuit Court of Appeals violates petitioner's constitutional rights.

SUMMARY OF ARGUMENT

In summation, petitioner respectfully submits to this Honorable Court that the writ prayed for should be granted for the following reasons:

(a) The opinion of the Circuit Court of Appeals is not in keeping with the applicable principles of Federal criminal law as enunciated in the cases cited under proposition 1;

(b) The opinion of the Circuit Court of Appeals is in conflict with the opinions from other Circuit Courts of Appeals cited under proposition 2;

(c) The opinion of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in Criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

L. J. SCOTT.

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